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PAROL TRUSTS IN REAL ESTATE.

In the case of Young *v.* Holland, 84 S. E. 637, reported in full in this issue of the LAW REGISTER, it is decided that an express trust in lands is not within the Virginia Statute of Frauds. At common law before the enactment of the English Statute of Frauds, 29 Car. II, an express trust in lands could be created by parol. That this was the common law may be subject to some doubt, but it is generally so stated in text-books, and as far as Virginia is concerned is so settled by the above case. The Code of Virginia, § 2840, provides that no action shall be brought to charge any person upon any contract for the sale of real estate, or for the lease thereof for more than a year; unless it be in writing. This provision is not as comprehensive as the fourth section of the English statute, which forbids an action on any contract or sale of lands or "any interest in or concerning them." By the English Statute of Frauds it is expressly provided, in the seventh section, that: "All declarations or creations of trust or confidences, of any lands, tenements, or hereditaments, shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of none effect." And by the eighth section it is declared that: "Where any conveyance shall be made of any lands or tenements by which a trust or confidence shall or may arise or result by the implication or construction of law, or be transferred or extinguished by an act or operation of law, then, and in every such case, such trust or confidence shall be of the like force and effect as the same would have been if this statute had not been made; anything hereinbefore contained to the contrary notwithstanding." These two sections have never been adopted in Virginia. In the case above it is held that the Virginia statute does not apply to trusts and therefore a parol trust in real estate is valid in

this state as it was at common law. As pointed out, this question was considered an unsettled one in this state, left undecided in a number of cases reviewed, but which had been decided in accordance with the above case in the case of Hancock *v.* Talley, 7 Va. Law Reg. 34, by a special court of appeals. See leading article in 7 Va. Law Reg. 15, and editorial in this issue of the REGISTER.

In Mead *v.* Randolph, 8 Texas 191, 199, it is said of parol trusts: "They are legal in their creation and proof. They rest for the sanction of courts of justice upon their intrinsic merits. They differ in no respect from other contracts authorized by law, and if meritorious, they can claim observance and fulfilment upon the grounds which would be sufficient to establish the like contracts if expressed in writing. A greater amount and more certainty of proof might be required for a parol than a written contract, but they are equally sanctioned by law and entitled to its supporting power."

As this question is no longer unsettled, it is unnecessary to question it, but it seems proper to treat some of the questions which will necessarily arise in future cases. In this article the cases from states holding such parol trusts invalid as within the statute are not followed, but an effort has been made to set forth the principles found in the decisions of North Carolina, Tennessee, Texas and a few other states prior to the adoption of the seventh section of the English statute in the latter. There were several states in which the seventh section was at one time omitted, but which was later adopted; for instance, Pennsylvania. The fact of the subsequent adoption of this section in these states may be a good precedent to be followed by the legislature of this state; for the mere fact of enactment is proof that this section was found beneficial. In Kisler *v.* Kisler, 2 Watts (Pa.) 323, 27 Am. Dec. 308, it is said: "These parol declarations will be found sufficiently introductive of frauds and perjuries."

It is generally considered that a parol contract within the tatute of frauds is not absolutely void, but its enforceability depends upon written proof to satisfy the statute. The contract is not void but unenforceable. Under the seventh sec-

tion of the English Statute of Frauds, there is high authority for the position that it is not necessary that the trust should be created by writing, but only that it should be manifested and proved by writing. A trust of land may still be effectually created by parol, and in order to satisfy the statute it is sufficient to show by written evidence the existence of the trust. See Mathews *v.* Massey, 4 Baxt. (Tenn.), 450, 459. This distinction is, however, unimportant under the decision of Young *v.* Holland.

"We know that it is now and always has been the constant practice of the courts of equity, throughout the entire state, to set up and enforce by proof (express) declarations of trusts not in writing and to engraft them on deeds absolute on their face. A familiar instance is that of showing by parol that a deed absolute on its face, was, by a verbal agreement, intended to be a mortgage. This, I suppose, has been done by every court in the state, having chancery jurisdiction, while the right to do so has never been questioned. Ross *v.* Norvell, 1 Wash. 14; Robertson *v.* Campbell, 2 Call 421, and Owen *v.* Sharp, 12 Leigh 427." Hancock *v.* Talley, 7 Va. Law Reg. 24, 34.

FORM AND SUFFICIENCY OF DECLARATION OF TRUST.

No particular form of words is necessary to create the trust; it is only necessary to express the interest of the parties in the premises. Fleming *v.* Donahoe, 5 Ohio 255, 258. The declarations of trust must be unequivocal and explicit. Young *v.* Holland, 84 S. E. 637. Loose and indefinite expressions will not do. Currence *v.* Ward, 43 W. Va. 367, 27 S. E. 329, 330. Declarations and admissions of the party charged, accompanying and contemporaneous with the transfer of the title to which the trust is alleged to be annexed, distinctly recognizing the trust, are sufficient to authorize the court to enforce the equity. But it is otherwise when the admissions are in respect to a trust antecedently created. Smiley *v.* Pearce, 98 N. C. 131. See Williams *v.* Hodges, 95 N. C. 27, in which it is held that to establish a parol trust in one who has acquired the title to land, something more than the simple declaration of the person sought to be charged is required; there must be proof of

acts in connection therewith, inconsistent with a purpose on his part to purchase or hold the land for himself absolutely; Kisler *v.* Kisler, 2 Watts (Pa.) 323, 27 Am. Dec. 308, 312, and where mere declarations of a party that he purchases land for another without any previous agreement, or without any advance of money for the purpose, is held not to be such a transaction as will raise a trust which equity will enforce.

Where plaintiff received a deed for property upon an agreement at the time of the execution of the deed that he would convey the land to defendant, to whom the vendor had agreed to give a first option, on the payment by defendant of a certain consideration, a parol trust was created in favor of defendant, enforceable against plaintiff, as trustee of the legal title. Sykes *v.* Boone, 132 N. C. 199, 43 S. E. 645. In absence of legislation, no peculiar efficacy is to be given to a parol declaration simply because it happens to be in writing, and upon principle it is of no higher dignity than one which is purely oral. Williams *v.* Hodges, 95 N. C. 32.

MADE AT TIME OF CONVEYANCE OF LEGAL ESTATE.

Where the legal estate is not conveyed, a trust can not be raised by a parol declaration, even though founded upon a valuable consideration, and followed by actual occupancy and the erection of valuable improvements. Frey *v.* Ramsour, 66 N. C. 466; Cobb *v.* Edwards, 117 N. C. 244, 23 S. E. 241, 242. These cases sustain the contention made in this article that the trust estate can not be subsequently conveyed by the beneficiary by parol.

The trusts must be created before the trustee obtains legal title, for, if the agreement be subsequent, it would fall under the provisions of the statute of frauds requiring the transfer or sale of lands to be in writing. Smith *v.* Turley, 32 W. Va. 14, 9 S. E. 46; Currence *v.* Ward, 43 W. Va. 367, 27 S. E. 329, 330; Smiley *v.* Pearce, 98 N. C. 131; Kelly *v.* McNeill, 118 N. C. 349, 24 S. E. 738; Hamilton *v.* Buchanan, 112 N. C. 463, 17 S. E. 159.

The fact that the agreement uses the words, "We have this day entered into this agreement," does not show that the trust

agreement was not made at the date of the deed carrying the trust. Renshaw *v.* First Nat. Bank of Tullahoma (Tenn.), 63 S. W. 194. "It seems to me the 'declarations or creations of trusts or confidences,' prohibited by the British statute and tolerated by your own, are such as the grantor of the legal estate is competent to make, as a further disposition of the beneficiary interest, and not the confession of a condition or agreement subsequently fastened on the title by the grantee. The first may be evidence by the declaration of either party to the conveyance, with the assent of the other; and it vests an equitable title under our statute. But were the second permitted to have an effect forbidden to any other executory contract for the title, it would be pregnant with all the danger intended to be guarded against by either statute. Even when restrained to gratuitous trusts expressed at the execution of the conveyance, these parol declarations will be found sufficiently introductive of frauds and perjuries. But, with the qualifications indicated, they may certainly be sustained by parol proof." Kisler *v.* Kisler, 2 Watts (Pa.), 323, 27 Am. Dec. 308, 311. It is held that where the grantor by a mere declaration, ingrafts upon his own deed a trust, the declaration must be neither prior nor subsequent to, but contemporaneous with, its execution. Blount *v.* Washington, 108 N. C. 232, 12 S. E. 1008; Smiley *v.* Pearce, 98 N. C. 185, 3 S. E. 631; Cobb *v.* Edwards, 117 N. C. 244, 23 S. E. 241.

Evidence to Prove Trust.

The declaration of trust must be established by clear and convincing proof. Young *v.* Holland, 84 S. E. 637; Clement *v.* Clement, 1 Jones Eq. 184; Leggett *v.* Leggett, 88 N. C. 108; Williams *v.* Hodges, 95 N. C. 32; Smiley *v.* Pearce, 98 N. C. 185; McNair *v.* Pope, 100 N. C. 404; Hinton *v.* Pritchard (N. C.), 10 L. R. A. 401, 404. No particular kind or standard of evidence is required. Williams *v.* Hodges, 95 N. C. 27, 29. But the evidence must be such as is reasonably attainable under the circumstances of each case. Mead *v.* Randolph, 8 Tex. 191, 199. The rules in relation to implied or constructive trusts might doubtless be applied advantageously to the proof

of express parol trusts. Mead *v.* Randolph, 8 Tex. 191, 199. The rule is the same as where the equity grows out of furnishing the purchase money to another, who takes title to himself. Cobb *v.* Edwards, 117 N. C. 244, 23 S. E. 241. But the jury must find that there is some evidence of the antecedent understanding, and sufficiently strong to convince them that the parties concurred in giving their assent to it. Kelly *v.* McNeill, 118 N. C. 349, 24 S. E. 738. The question whether more than a preponderance of evidence is necessary to warrant the jury in rendering a verdict in favor of such a trust was left unanswered in Williams *v.* Hodges, 95 N. C. 27, 29; but in Johnson *v.* Quarles, 46 Mo. 423, it is held that evidence to prove a resulting trust must be clear and unequivocal, not merely preponderating, and there should be no room for reasonable doubt as to the facts relied upon. While proof of the trust should not rest alone upon the testimony of the party asserting the trust, where the purchaser and the husband of the beneficiary both are dead, and she had to rely on her own testimony solely to show that the agreement referred to the property in controversy covered by the deed, it was held that the proof under these circumstances was sufficient to establish a parol express trust in favor of the wife. Renshaw *v.* First Nat. Bank of Tullahoma (Tenn.), 63 S. W. 194.

Parol trusts can not be proved by the evidence of the simple declarations of the party to be charged alone; in addition there must be evidence of facts and circumstances or acts dehors the deed, absolute upon its face, made to the purchaser of the land, inconsistent with a purpose on his part to purchase absolutely for himself. Williams *v.* Hodges, 95 N. C. 27. Evidence of facts or circumstances inconsistent with a purpose on the part of the purchaser to hold the land for himself, may be manifested by conduct subsequent to the sale. Cobb *v.* Edwards, 117 N. C. 244, 23 S. E. 241. This case is distinguished from that class of suits in equity brought to reform and correct a deed upon the ground of fraud, ignorance, mutual mistake, or undue advantage, where evidence of mere declarations is held insufficient; and proof of matters dehors the deed, and incompatible with the idea that it embodies the intent of the parties, is required

before equity will interfere. It is not material whether the proof in this case does or does not come up to the strict requirement in that class of cases, since a different rule is applicable where the plaintiff simply seeks, by evidence of a previous or contemporaneous agreement, to ingraft upon the deed of a purchaser at a judicial sale a trust to hold the legal estate for others, who are to repay the purchase money advanced by him. Cobb *v.* Edwards, 117 N. C. 244, 23 S. E 241. But while such subsequent declarations are not, of themselves, sufficient to establish a trust, they are corroborative of the evidence that there was an agreement to hold in trust existing at the time of the sale. Hamilton *v.* Buchanan, 112 N. C. 463, 17 S. E. 159.

To prove a trust where one purchases at judicial sale, having at the time of bidding or previously agreed that he would buy it and hold it subject to the right of the other to repay the purchase money and demand a conveyance, it is not necessary to prove anything before the sale, except the agreement; but it is enough that evidence of this be supported by facts or circumstances, subsequent to the sale, inconsistent with a purpose on the part of the purchaser to hold the land for himself. Cobb *v.* Edwards, 117 N. C. 244, 23 S. E. 241. Where, on a foreclosure sale the widow of a mortgagor bought in the land, it is claimed that she bought it in for the benefit of her children as well as of herself, proof that she so stated at the time, and practically so admitted when called as a witness, is not sufficient evidence to prove an express trust. It is apparent from her testimony that she was an ignorant woman and that all that she meant by her statement, that she bought the land for herself and children, is that her children, as her only heirs at law, would get the land at her death, and that she bought the land with the intention of acquiring title thereto in fee simple in herself. Kyle *v.* Wills, 166 Ill. 501, 46 N. E. 1121.

There being evidence, of the kind required by law, tending to show an agreement existing at the time of the sale, that the purchaser should hold for another, and also tending to prove independent acts or omissions of the purchaser inconsistent with the claim of ownership, it is the duty of the court merely to instruct that the law requires clear, strong, and convincing proof

to show the agreement, as well as the subsequent acts or omissions, and the jury is to decide whether the evidence is sufficient. Cobb *v.* Edwards, 117 N. C. 244, 23 S. E. 241.

The purchaser at a judicial sale of the land of intestate was W., the husband of one of the four heirs of intestate. J., another heir, was guardian of the two remaining heirs, E. and C. C. testified that he heard J. ask W. to buy it at the sale, and that he agreed to purchase it, and hold it till "we" could redeem it. Another testified that during the bidding W. asked another person not to bid, as he was bidding for J. and E. Another testified that he heard W. say that his wife and J. had asked him to buy the land for them, and he was going to do so. Another testified that W. said they had asked him to buy it, and he was going to buy it, to keep it in the family. Another testified that W. said he would be willing for the heirs to have it back, if they would pay his money and interest. Another testified that after the sale W. told him J. had asked him to buy it, and he agreed to, and, if they would pay the money back, he would convey the land back. Others testified to declarations of W. that he had bought it for them, and had turned it over to J. to rent, the rents to be paid to him till the debt for the purchase money was discharged. Held sufficient to show an understanding that the land was to be bought for the heirs, according to their interests. Cobb *v.* Edwards, 117 N. C. 244, 23 S. E. 241.

Necessity for Consideration.

It seems that at common law no use or trust could be raised in lands without a consideration, except in the single instance of a conveyance operated by transmutation of possession, the character of the conveyance alone being sufficient to raise the use, and to dispense with the necessity for a consideration. This view is distinctly approved in Wood *v.* Cherry, 73 N. C. 110. In a resulting trust, where one pays the money for land purchased and takes a deed to another, the trust results to him who paid the money, because he is deemed the real purchaser. This is analogous to a feoffment at common law where the use follows the consideration. The payment of the money at the time is indispensable to the creation of the trust. But a perfect or

complete trust is valid and enforceable, although based on a purely voluntary consideration. Leeper *v.* Taylor, 111 Mo. 312.

A declaration of an express trust, made by a purchaser of property at or before the time the legal estate passes, is enforceable in favor of a mere volunteer. Sykes *v.* Boone, 132 N. C. 199, 43 S. E. 645; Blackburn *v.* Blackburn, 109 N. C. 488, 13 S. E. 937.

In Dennison *v.* Goehring, 7 Pa. 175, 47 Am. Dec. 505, the conveyance had been made to a person who himself paid the purchase money, but the parol trust was declared for another, who happened, it is true, to be the child of the bargainor. It was held that the trust, though voluntary, was valid, and enforceable in equity. The trust having been declared at the time the legal title passed, and being, therefore, an executed or perfected trust as distinguished from an executory trust or one arising out of an executory agreement, the court would enforce it even in favor of a volunteer, or without any consideration moving from the beneficiary to support it. Where one obtains a conveyance of property on an agreement to convey the title to another on payment of a certain consideration by that other, his promise is part of the consideration for the conveyance, and raises a sufficient equity to enforce his agreement. Sykes *v.* Boone, 132 N. C. 199, 43 S. E. 645.

Relation between Parties.

Where a purchaser of real estate paying the price directs the vendors to convey to her daughter, an oral declaration of trust to collect the rents for the grantor is valid as an express but not as an implied trust. Young *v.* Holland, 84 S. E. 637 In Woodfin *v.* Marks, 104 Tenn. 512, 58 S. W. 227, it is held that the trust relation may be established between a widow and a purchaser at her deceased husband's administration sale; in Woodfin *v.* Marks, 104 Tenn. 512, 58 S. W. 227; Haywood *v.* Ensley, 8 Humph. (Tenn.), 459; Dennison *v.* Goehring, 7 Pa. 175, 49 Am. Dec. 505, that the trust relation may be established between parent and child; in Blount *v.* Carroway, 67 N. C. 396, that the relation may be established between the mortgagee and the wife of the mortgagor; and in Currence *v.* Ward, 43 W. Va. 367, 27

S. E. 329, that the relation may be establised between creditor and debtor.

Where a power of sale was given by mortgagor to the mortgagee, in consideration of which the mortgagee agreed to convey a portion of the land embraced in the deed, to a trustee, for the benefit of the mortgagor's wife; it was held, that this contract did not come within the provisions of the statute of frauds, and that the mortgagee should be held a trustee, and bound to convey, according to the agreement. In such cases an agreement proved only by parol will not suffice, there must be facts dehors. Blount *v.* Carroway, 67 N. C. 396. Where A takes a conveyance of a tract of land which B, the owner, had agreed by bond to convey to C, upon special trust and confidence, that he will give C the same terms of payment that he had from B, and on such payment being made that he will convey to C, and A gets possession of the title bond which enables him to get the deed from B, it was held, that this agreement is not within the statute of frauds, and that C was entitled to relief. Cloninger *v.* Summit, 55 N. C. 513.

In Kisler *v.* Kisler, 2 Watts (Pa.) 323, 27 Am. Dec. 308, it is held that the omission of the seventh section of the statute of frauds gives room for a declaration of trust by parol; but it does not make that a trust relation which was not a trust before. A purchase of land by a guardian, which he declared at the time to be for the use of his ward, is not such a trust as can be enforced by the ward, but is within the provisions of the statute of frauds and perjuries. In the opinion it is said: "That an express trust may be declared by parol, I am not disposed to deny; but if declared by the grantee and not the grantor of the legal estate, where its object is not to indicate a beneficiary purpose by the grantor in favor of the cestui que trust, it must, to be binding, be made in consideration of payment of the purchase money by the cestui que trust; and then it would produce no other effect than the law would produce without it. Probably it was the object of the statute to sustain a gift of the land by the grantor to a person not named in the conveyance, but not a gift by the party purchasing, the execution of which could not be enforced for want of a consideration. If I pro-

claim that I hold my house for B., it is evidence of a trust which may, however, be rebutted by proof that the beneficial ownership is not in him, for such a declaration is not binding as a gift even of a chattel. But if I convey my house to A., with parol direction to hold it for B., a confidence arises which it would be unconscionable in A. to violate; and this would constitute that species of express parol trust, which it was the object of our statute to sustain. But if I proclaim that I hold my house for B., on terms of conveying it to him when he shall reimburse me what I paid for it, this is not a trust, but a contract of sale within the operation of the prohibitory clause."

It is generally held that an agreement to become partners in dealing in real estate is neither a contract to buy nor a contract to sell real estate as between the parties to it, and need not be in writing. "So far as the formation of the copartnership is concerned, the title to real estate is no wise affected by the making of the agreement. The terms of the agreement, the mutual undertakings by the partners as between themselves as to what each will contribute, and the interests of each in the profits of their undertaking, are matters not necessarily affected by the statute. The most numerous, and what seems to us the best-reasoned, authorities hold that such contract need not be in writing if to be begun and may end within a year, although as a fact it may not be terminated for more than a year. * * * In this state the doctrine prevails that partnership real estate is deemed personalty for the purposes of the partnership, * * * which is sometimes given as one of the reasons for the rule that agreements to become partners in dealing in lands is not within the statute." Garth *v.* Davis, 120 Ky. 106, 85 S. W. 692, 117 Am. St. Rep. 571, 573. In the case of Gardner *v.* Randell, 70 Tex. 453, 70 S. W. 781, two persons entered into a verbal agreement to purchase property together. One took a bond for title in his own name, and afterwards paid the full price, taking the deed in his own name. This was done under an oral agreement that the other should have a half interest, and repay his share of the purchase money in ninety days. He tendered the sum within the time, and demanded his half interest. The court upheld his demand, holding that it was an express trust,

which in this state can be created in land by parol. Lucia *v.* Adams, 36 Tex. Civ. App. 454, 82 S. W. 335, 336.

But in Henderson *v.* Hudson, 1 Munf. 510, it is held that the statute to prevent frauds and perjuries applies to an agreement between a purchaser of land and a third person that such person should be admitted as a partner in the purchase. In answer to the objection that this was not a contract for the sale of lands, but for a purchase thereof in partnership, it was held that the transaction was both a contract for the sale of lands and for a purchase in partnership. It is thus clearly seen that the court in this instance declared the transaction within the statute because it was a contract for the sale of lands. Judge Fleming in his concurring opinion said: "Although, in the case before us, it is not immediately between a buyer and seller of land, yet it is within the mischief intended to be guarded against by the statute, which, being a remedial one, and intended to prevent a growing evil, ought to be liberally construed: and the admission of oral testimony to prove the agreement, denied by the appellant, tended by imputation to deprive him of a considerable part of his freehold and inheritance." Is this case overruled by the case of Young *v.* Holland? It would seem so. At least by reading the two decisions, one is aware of a change of judicial faith. While the two cases possibly can be distinguished, the case of Henderson *v.* Henderson does not seem to accord with the case of Young *v.* Holland as well as does the case of Garth *v.* Davis, 120 Ky. 106, decided under a similar statute.

Rights of Parties in Trust Estate.

The statute of limitations does not run in favor of one holding land under a parol trust so long as he recognizes the trust and admits that he is holding in compliance with it. Hinton *v.* Pritchard, 10 L. R. A. 401.

While an express trust in lands may be created by a parol declaration, made contemporaneously with the transfer of the legal title, such trust when created, together with the resultant interest of the trustor, can be conveyed only in the same manner as other equitable interests in real property. Patton *v.* Clendenin, 3 Murph. 68; Holmes *v.* Holmes, 86 N. C. 208; Dover *v.*

Rhea, 108 N. C. 88, 13 S. E. 164, 165. In Murphy *v.* Hubert, 7 Pa. St. 420, decided under the statute of frauds of Pennsylvania, prior to the adoption of the seventh section of the English Statute of Frauds, it was held that under the statute of Pennsylvania, which embraced the first three sections of the English statute, that a trust estate could be created by the verbal agreement of the grantee in an absolute deed, but that the equitable estate therein could not be conveyed by the beneficiary without written evidence or possession taken in part performance. The court said: "That the first three sections of the English statute, forming by consolidation the first in our act, are applicable exclusively to legal estates, is demonstrable by the fact that trusts were specifically provided for in the omitted section, though these sections, like our own section, contain the clause, 'in law or equity' on which the opposite hypothesis is founded. The obvious design of it was to prevent an equitable estate from being transferred, and the design of the seventh section was to prevent a trust estate from being created by parol. To be convinced of this, it is necessary only to compare the first and seventh sections side by side. What, then, do we gather from our own statute in which the seventh is omitted? Beyond a doubt, an equitable estate in Pennsylvania, such as the interest of a vendee, by articles of agreement, can not be conveyed by parol without part execution by delivery of possession; and this, by force of the statute in question; for the recording acts do not make registry essential to the validity of a conveyance: but it is a different thing to control the creation of a parol declaration of a trust." While the statute of Virginia is not as comprehensive as the statute of England and as it stood in Pennsylvania at the time of the above decision, and does not contain the words "in law or equity," it may at first reading appear not to embrace the conveyance of the equitable estate. Yet, as is stated above, it is necessary for the parol agreement to be accompanied by and made at the time of the transfer of the legal estate; it necessarily follows that a parol conveyance by the beneficiary, which can not be accompanied by a transfer of the legal estate, is invalid. However, the conclusion that the words of the statute, "any sale or lease of real estate," do not embrace such conveyance,

would appear to be consistent with the decision of Young *v.* Holland.

Of course the rights of the beneficiary are subject to the protection always given in equity to persons in the situation of bona fide purchasers for valuable consideration and without notice. It is as to such purchasers only and creditors that the trust is affected by the recording acts. But a purchaser with notice takes subject to the trust. Woodfin *v.* Marks, 104 Tenn. 512, 58 S. W. 227. Code 1904, § 2463, providing that every contract not in writing for the conveyance or sale of real estate shall be void both at law and in equity as to purchasers for a valuable consideration without notice and creditors, does not affect the doctrine of resulting trusts, created where land purchased and paid for by one is conveyed to another, and a judgment against the grantee does not bind the beneficial interest of the real purchaser. Straley *v.* Esser, 1 Va. Law Reg., N. S., 14. Judgment creditors of the trustee of a constructive trust can not subject the land, the rule being uniformly applied that only the debtor's beneficial interest in the land may be subjected by his creditors, and in such case the trustee has none, as of course, also, he would not have if the trust were express. Straley *v.* Esser, 1 Va. Law Reg., N. S., 14, 21.

Effect of Parol Evidence Rule.

An oral declaration of trust binding a grantee in a deed absolute in form is not within the rule forbidding parol evidence to vary, contradict, add to or explain a written instrument. In Young *v.* Holland (Va.), 84 S. E. 637, 640, the court said: "Counsel for appellees have argued with great force that to maintain the express trust by parol evidence would violate that principle of law, nowhere more closely adhered to than in this state, that parol evidence can not be admitted to vary, contradict, add to, or explain the terms of a written agreement. If at the common law an express declaration of trust such as is here sought to be established was lawful, and if by the statute of frauds as adopted in this state the common law was not in this respect altered, then such an express declaration remains lawful. In the nature of things an oral declaration can only be established

by oral evidence, and we do not think that the position can be maintained that an oral declaration of trust is sanctioned by our law, and the only possible mode of proof is to be excluded; in other words, we can not maintain a right and exclude the only mode of proof by which that right can be established.

The general principle that parol proof is not admissible to change, alter or contradict the terms of a written instrument is applicable to the proof of the parol trust in opposition to the terms of the deed. In other words, if the deed, upon its face and by its terms, is absolute, and conveys to the grantee a fee-simple estate, without more, the trust character can be shown by parol, because this would not in any way contradict the terms of the deed. Woodfin *v.* Marks, 104 Tenn. 512, 58 S. W. 227; Hall *v.* Livingston, 3 Del. Ch. 373; Brison *v.* Brison, 75 Cal. 533, 17 Pac. 689, 7 Am. St. Rep. 189; Shelton *v.* Shelton, 58 N. C. 295; Patton *v.* Beecher, 62 Ala. 585. If the deed contains the usual habendum clause of a fee-simple deed, without more, then parol proof is competent to show that, while the deed is in form a fee-simple conveyance, still it is impressed by an unexpressed agreement with a beneficial trust in favor of a third person not mentioned in the face of the deed. Mee *v.* Mee, 113 Tenn. 453, 82 S. W. 830.

But if the deed contains provisions which expressly or by clear implication give the grantee a power or discretion to defeat the trust, or are inconsistent with it, then the trust does not exist in such shape as to be mandatory upon the grantee. If the deed, after conveying a fee-simple estate, contains provisions which confer upon the grantee discretionary power to defeat the trust, then parol evidence is not competent to defeat these provisions, and the deed cannot thus be altered or contradicted, or its provisions modified or impressed with any character or trust inconsistent with the provisions of the deed. A provision that the grantee is "authorized and empowered to sell, to dispose of and convey, any and all of said property by sale or by will, or otherwise, as she may see fit to do, and for such purposes as she may deem best," is totally inconsistent with a mandatory trust upon the grantee to convey it otherwise than at her discretion, and for such purpose as she may deem best, and parol proof is

not competent to change, alter, modify, or nullify these provisions, or to defeat such discretion. Mee *v.* Mee, 113 Tenn. 453, 82 S. W. 830.

The court in the above case at page 462 said: "There is a well-recognized distinction between contradicting a deed or impairing its legal operation and the arising out of the transaction of an equity dehors the deed binding the grantee's conscience to hold the land for the real purposes of the conveyance, and not according to its legal operation, when the latter use of it would, under the circumstances, work fraud. Such an equity is held to be independent of the deed, not excluded by it, as a mere conveyance of the legal estate, unless there be in it some terms or implication to that effect. To support such an equity, parol evidence is admissible, not as contradicting the deed, but as explanatory of the transactions out of which the equity arises. In such case no allegation is necessary that a declaration of the equity or trust was, through fraud or mistake, omitted in the deed, because, as the equity or trust arises out of the extrinsic circumstances, and is not at all dependent upon the face of the deed, it needs not, in order to effectuate it, that the deed be reformed, or, which is the same thing, treated as if reformed." See Fleming *v.* Donahoe, 5 Ohio 255, 258.

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